

**L.E., by next friends and parents,
SHELLEY ESQUIVEL and
MARIO ESQUIVEL,**

Plaintiff,

v.

**BILL LEE, in his official capacity as
Governor of Tennessee; et al.,**

**KNOX COUNTY BOARD OF
EDUCATION a/k/a KNOX COUNTY
SCHOOL DISTRICT; et al.,**

Defendants.

Magistrate Judge Newbern

Case 3:21-cv-00835 Document 83 Filed 01/26/23 Page 1 of 5 PageID #: 2715

Defendants Governor Lee, Commissioner Schwinn, Executive Director Morrison, members of the Tennessee State Board of Education, in their official capacities, and the Tennessee State Board of Education (“State Defendants”) provide notice of *B. P. J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 111875 (S.D.W. Va. Jan. 5, 2023). In *B.P.J.*, a transgender, middle-school student challenged West Virginia’s “Save Women’s Sports Bill.”¹ The district court for the Southern District of West Virginia (“district court”) held that the law does not violate the Equal Protection Clause or Title IX.

Under its Equal Protection analysis, the district court utilized intermediate scrutiny because the Save Women’s Sports Bill “separates student athletes based on sex.” *B.P.J.*, at *6.² The bill requires athletic teams to “be expressly designated” as “either male, female, or coed,” W. Va. Code § 18-2-25d(c). “[B]iological males generally outperform females athletically[;] . . . [t]he state is permitted to legislate sports rules on this basis because sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports.” *Id.* at *8. The district court concluded that the legislature’s definition of “girl” as being based on “biological

¹ Akin to the Tennessee Gender in Athletics Law, the West Virginia law uses biological sex determined at birth to define whether an individual is male or female. W. Va. Code § 18-2-25d(b)(1)–(3). But it goes further than the challenged Tennessee law to *require* designation of an athletic team as “male, female, or coed.” W. Va. Code § 18-2-25d(c); *cf.* Tenn. Code Ann. § 49-7-180 (taking a similar approach for *intercollegiate* sports). In Tennessee, TSSAA decides whether to designate a high school athletic competition as male, female, or coed. (Defs.’ Resp. to Pl.’s SUMF ¶¶ 37, 39, ECF 71, PageID # 2159.)

² Although the West Virginia defendants disagreed with application of intermediate scrutiny, they did not argue rational basis and reserved the issue for any appeal. (Def. State of West Virginia’s Mem. in Support of Mot. for Summary Judgment, No. 2:21-cv-00316, ECF 287, PageID # 10193, at n.11.)

sex” and restriction of female sports to (biological) girls are substantially related to the important government interest of providing equal athletic opportunities for females. *Id.*³

The district court also ruled that it “cannot find unconstitutional animus” even if “at least one legislator held or implicitly supported private bias against, or moral disapproval of, transgender individuals.” *Id.* at *4. The district court could not find unconstitutional animus even though it viewed the statute as, “at best[,] a solution to a potential, but not yet realized, ‘problem.’” *Id.* “West Virginia had no known instance of any transgender person playing school sports” in West Virginia, only evidence about “transgender students playing sports in other states.” *Id.*

The district court agreed with defendants that West Virginia’s Save Women’s Sports Bill furthers the purposes of Title IX. *Id.* at *9. “There is no serious debate that Title IX’s endorsement of sex separation in sports refers to biological sex.” *Id.* The district court rejected the plaintiff’s argument “that transgender girls are similarly situated to cisgender girls, and therefore their exclusion from girls’ teams is unlawful discrimination.” *Id.* “[T]ransgender girls are biologically male[;] [s]hort of any medical intervention that will differ for each individual person, biological males are not similarly situated to biological females for purposes of athletics.” *Id.* As in this case, the plaintiff focused on “the moment” students “verbalize their transgender status,” *id.* at *8, despite a “concession that circulating testosterone in males creates a biological difference in athletic performance,” *id.* at *7. The district court also stated that “transgender girls are not excluded from school sports entirely”—“[t]hey are permitted to try out for boys’ teams, regardless

³ While the district court cited the 2022 definition of “gender” from PFLAG, an LGBTQ+ advocacy group, *B.P.J.*, at *7, the Plaintiff in this case has not provided *any* definition of “gender.” *Cf. Adams v. Sch. Bd. of St. Johns Cnty.*, No. 18-13593, 2022 WL 18003879, at *33 n.2 (11th Cir. Dec. 30, 2022) (Jill Pryor, J., dissenting) (“I am confined to the record, where the terms [“sex” and “gender”] are used synonymously.”). In any case, the 2022 PFLAG Glossary is not a neutral dictionary, postdates the enactment of the law challenged here, and at most shows the importance of the Gender in Athletics Law providing clarity to Tennesseans about the meaning of “gender.”

of how they express their gender.” *Id.* at *9. The district court concluded that the Save Women’s Sports Bill “largely mirrors Title IX” and does not violate Title IX. *Id.* at *10.

Respectfully submitted,

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I hereby certify that a true and exact copy of this Notice of Supplemental Authority has been served through the e-filing system on January 26, 2023, to:

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